IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.1013 OF 1981

Oceanic Imports & Exports Corporation .. Plaintiffs

Vs.

Punjab National Bank & Anr. .. Defendants

WITH

SUIT NO.1225 OF 1981

Punjab National Bank .. Plaintiffs

Vs.

Oceanic Imports and Exports Corporation & Ors. .. Defendants

Mr.P.G.Pravin for the plaintiffs in suit no.1013 of 1981 and defendant in suit no.1225 of 1981

Ms.Neepa Singh i/b Mr.Mahesh Menon for the defendant no.1 in suit No.1013 of 1981 and plaintiff in suit no.1225 of 1981

Mr.J.P.Sen with Ms.V.Mirashi i/b Shah & Sanghavi for defenant no.2 in Suit No.1013 of 1981

CORAM : S.U.KAMDAR, J

DATED : 23RD JANUARY 2006

P.C.:

1. These two suits arising between the same

parties are tried together and common evidence has been laid and therefore, both the suits are disposed of by the present common judgment. The brief facts of both the aforesaid suits are briefly enumerated as under:

2. Suit No.1013 of 1981 has been filed by a duly registered partnership firm and carrying on business at Bombay. Defendant no.1 in that suit is Punjab National Bank and defendant no.2 is Company known as Mohan Meakin Breweries Ltd. Suit No. 1225 of 1981 has been filed by Punjab National Bank who is defendant no.1 in Suit No.1013 of 1981. Plaintiffs in Suit No.1013 of 81 is defendant no.1 in Suit No.1225 of 1981 and defendant no.2 to 5 thereof are partners of defendant no.1 who are also guarantors for the defendant no.1 in respect of loan advanced by Punjab National Bank.

3. In Suit No.1013 of 1981, an agreement was executed by and between the plaintiffs and defendant no.2 on 14.7.78. Under the said agreement dt.14.7.78, it has been interalia provided that the said agreement has been entered

into between the parties in supersession of all earlier correspondence including letter dt.3.2.77. It is further provided that plaintiffs have procured five replenishment licences as set out in Annexure 'A' thereof of the face value of Rs.7,76,670/-. Under the said terms and conditions of the agreement, it has been provided that the plaintiffs will import certain goods for the defendant no.2 on various terms and conditions as mentioned in the said agreement dt.14.7.78. Thus, in short, plaintiff has transferred their entitlements of import licence to defendant no.2 under the said agreement. Under the terms and conditions of the agreement, it was provided that defendant no.2 will make payment to the plaintiff of 32% of the full premium amount totalling to Rs.2,48,535/- and as against that plaintiffs will furnish bank guarantee to defendant no.2 of scheduled bank of sum of Rs.2,48,535/- and the same will be valid upto 31.3.79. There is no dispute that the defendant no.2 made payment of sum of Rs.39,000/- towards the said 32% premium payable to the plaintiffs herein and according to the terms and conditions thereafter plaintiffs were required

to place orders for import of various items as mentioned in Annexure 'B' to the said agreement dt.14.7.78. It was also further provided that the plaintiffs will undertake all formalities including opening of Letter of Credit and custom formalities for the purpose of clearance of the said goods. According to the plaintiffs they were required to carry out their obligations as conferred on them in the said agreement dt.14.7.78 only after receipt of letter of authority from defendant no.2 and till that they were not required to take any steps under the said agreement. It is a case of the plaintiffs that though the agreement dt.14.7.78 was executed in July 1978 but letter of authority was for the first time given only on 26.12.78 and that also only one letter of authority as against five licenses. It is further case of the plaintiffs that letter of authority was only valid upto 31.12.78 both for the purpose of opening Letter of Credit as well as importation of clearance of goods under the five different licences. It is the case of the plaintiffs that in between 26.12.78 and 31.12.78 there was a bank strike on 28th and 29.12.78 and no banking business was transacted.

On 30.12.78 banks were closed being annual accounts closing day and 31.12.78 was Sunday. It is therefore, the case of the plaintiff that thus, effectively plaintiffs were given only one day for the purpose of discharge the agreement dt.14.7.78 i.e. 27.12.78 alone. It is the case of the plaintiffs that defendant no.2 by its own failure to comply with the obligation contained under the agreement dt.14.7.78 have created a situation by which plaintiffs were not permitted to perform the said agreement dt.14.7.78.

4. It was the case of the plaintiffs that thus, agreement became impossible to perform by virtue of the steps taken or by virtue of omission to take steps by defendant no.2 right upto to 26.12.78 when for the first time letter of authority was received and therefore, plaintiffs are discharged from performing its obligation under the said agreement dt.14.7.78 of opening letter of Credit, placing orders and importing goods and subsequently clearing the same for home consumption. It is further the case of the plaintiffs that even letter of authority which was

given on 26.12.78 was not an authority permitting clearance of goods and thus, performing of contract in terms of agreement dt.14.7.78 was impossible. It is further the case of the plaintiffs that even though defendant no.2 did not execute letter of authority as late as 26.12.78 still plaintiffs took full steps and carried out its obligation under the said agreement to the extent it was possible. It is further the case of the plaintiffs that on or about 8.12.78 defendant no.2 made payment of balance premium amount and simultaneously so called plaintiffs procured two bank guarantees from Colaba Branch totalling to Rs.2,48,535/- in favour of defendant no.2. It is further the case of the plaintiffs that such bank guarantees were specifically executed in terms of suit agreement dt.14.7.78 and the same were to remain in force till 31.12.79 though the contract was upto 31.12.78. It is the case of the plaintiffs that thereafter by mutual understanding the said bank guarantees were extended upto 30.6.79. It is further case of the plaintiffs that on 27.12.78 plaintiffs addressed a letter to defendant no.2 interalia pointing out non-compliance of their

obligation by defendant no.2 and recorded that they received letter of authority only against one licence and that also on 26.12.78 and thus performance of contract by 31.12.78 in terms of agreement dt.14.7.78 is totally impossible. All other difficulties were also set out in letter dt.26.12.78. On 13.1.79 according to plaintiffs, defendant no.1 first time made out a false case that defendant no.2 is not in any breach of any terms of the agreement and at the same time instructed defendant no.1 bank not to part with the amount covered under bank guarantees and that they are intending to encash the same thereafter. Correspondence was exchanged by and between the parties and ultimately defendant no.2 invoked the said bank guarantee by letter dt.19.3.79. Pursuant to the invocation of the bank guarantee defendant no.1 called upon plaintiffs to put them in fund of the balance amount. Ultimately, by letter dt.26.4.79, defendant no.1 informed plaintiffs that they have decided to make payment under the said bank guarantee to defendant no.2 and infact called upon plaintiffs to make payment of the Rs.80,000/- being the difference between the amount held by

bank of Rs.1,68,535/- and bank guarantee amount which is due and payable by defendant no.1 bank to the plaintiffs herein. Defendant no.1 also threatened that they will enforce equitable mortgage which has been created by the plaintiffs and the partners of defendant no.1 in respect of the flat which was mortgage for the purpose of amount of loan lent and advanced under the bank guarantee facility. Ultimately, after considerable correspondence, plaintiffs filed a suit in City Civil Court being Suit No.2288 of 79 seeking perpetual injunction restraining defendant no.1 from making payment of the said bank guarantee amount to defendant no.2. The said injunction which was initially granted by City Civil Court was vacated by Hon'ble High Court and ultimately it was held that City Civil Court has no Jurisdiction to try and entertain the suit because claim was more than Rs.50000 and thus, the suit would lie in the High Court. Ultimately, the said bank guarantee was encashed by defendant no.2 and defendant no.1 made payment of the bank guarantee amount to defendant no.2 herein. While making payment defendant no.1 bank appropriated Rs.1,68,535/-

which was lying as lien against the said bank guarantee and demanded from plaintiff balance sum of Rs.80000 failing which they will enforce equitable mortgage.

5. The plaintiffs have thereafter filed the present suit interalia seeking relief that invocation of two bank guarantees was illegal and invalid and bank guarantees have come to an end. It has been also claimed that plaintiffs are entitled to order and decree as against defendant no.1 bank for Rs.2,38,216/- with interest on principal amount of Rs.168535 @ 18% p.a. In the alternatively, they have also claimed decree against defendant no.2 for the entire sum of Rs.2,38,216/-. Suit is interalia filed on the ground that invocation of bank guarantee was wrongful and in any event, defendant no.1 could not have made payment under the said bank guarantee to the defendant no.2 since defendant no.2 had not filed any action within the period prescribed under the bank guarantee by filing a suit in the court of competent Jurisdiction and therefore defendant no.1 ought not to have made payment of the said amount.

Defendant no.1 filed a written statement and it has been interalia contended that the action on the part of defendant no.2 is legal and valid. It has been contended by the defendant no.1 that bank guarantee was given was unconditional on demand and thus, bank was liable to make payment irrespective of the fact about the breach of agreement dt.14.7.78 which was an issue between the plaintiff and defendant no.2. It has also been pointed out that on 9.1.79 defendant no.2 invoked bank guarantee and lodged the claim and inspite of making repeated demands, plaintiffs failed to make payment because defendant no.1 was liable to honour its commitment under the said bank guarantee and accordingly, amount has been duly paid. It has been thus, contended that plaintiffs cannot claim any decree as against defendant no.1 because it was liable to make payment of the said amount as claimed under the said bank guarantee to honour its commitment. Written statement has also been filed by the defendant no.2 in the present suit inter alia contending that defendant no.2 is not in any breach of any of the terms and conditions of the agreement dt.14.7.78 but it is the plaintiffs who

are in breach of the agreement dt.14.7.78. It has been contended by defendant no.2 in the written statement that plaintiffs having committed breach of the terms and conditions of the agreement dt.14.7.78 defendant no.2 has rightly invoked bank guarantee and defendant no.1 has rightly made payment under the said bank guarantee. Thus, the question of any claim as against defendant no.2. does not arise. It has been further contended by defendant no.2 that suit filed is frivolous and the same is liable to be dismissed.

6. Plaintiffs have also filed a suit for recovery of balance amount as covered by bank guarantee. It is the case of plaintiff in suit no.1225 of 1981 that they lent and advanced to the defendant no.1 in that suit a facility for bank guarantees. It is the case of plaintiffs therein that as against said facility defendant no.1 who was the borrower has mortgaged flat being flat bearing no.101, Building no.3, Darya Mahal (A), Sagar Co-op.Housing Society Ltd, 18, Napean Sea Road, Bombay 400 006 by way of deposit of title. It is the case of plaintiff bank that defendant

no.5 is also a guarantor in respect of repayment of defendant no.1 and defendant no.2 to 4 are the partners of defendant no.1 who is the plaintiffs in suit no.1013 of 1981. It is further the case of the plaintiff in that suit that bank guarantee was rightly invoked by defendant no.2 and defendant no.1 has rightly honoured its commitment by making payment of the said bank guarantee amount. The said suit is accordingly filed after adjustment of the fixed deposit amount of Rs.1,68,535/- and balance amount is claimed of Rs.80000. Suit with interest is filed for sum of Rs.1,18,384.76. To this suit, defendants have filed a written statement and has interalia repeated the said case which they have pleaded in suit no.1013 of 1981 i.e. invocation of bank guarantee is wrongful and bank ought not to have made payment to defendant no.2 because defendant no.2 is in breach of the terms and conditions of the agreement dt.14.7.78. On the aforesaid pleadings issues were framed by the court. The issues are as under:

ISSUES IN SUIT NO.1013 OF 1981

1. Whether the plaintiffs prove that they are entitled to a declaration that the two Bank Guarantees under the Agreement dt.14th July 1978 came to an end or became unenforceable or were not valid and subsisting when invoked?

2. Whether the plaintiffs prove that the Defendant No.1 is liable to pay to the plaintiffs Rs.2,38,216/- with interest thereon at the rate of 18% per annum?

3. Whether the plaintiffs prove that they had any right to restrain the Defendant No.1 from releasing the monies under the said Guarantees?

4. Whether the plaintiffs prove that the Defendant No.2 failed to lodge a claim in time and therefore, the Defendant No.1 stood discharged and relieved from their obligation of payment under the Guarantee?

5. Whether the plaintiffs prove that the obligation of Defendant No.1 under Bank Guarantee was affected by any difference or dispute between defendant no.2 and the plaintiffs?

6. Whether the plaintiffs prove that the said guarantee did not contain an unequivocal provision to pay upon invocation without demur or protest?

7. Whether the plaintiffs prove that they are not liable to the Defendant no.1 to the extent of Rs.80,000/- which amount was required to make up the liability which Defendant No.1 had incurred under the said Guarantee?

8. If so, what orders?

ISSUES IN SUIT NO.1225 OF 1981

1. Whether the plaintiff proves that there is due and payable by the Defendants jointly and severally to the plaintiff a sum of Rs.1,18,384.76 with further interest on the said sum at the rate of 18.5% per annum?

2. Whether the plaintiff proves that they are entitled to a declaration that the repayment of Rs.1,18,384.76 (Rupees One Lakh Eighteen Thousand Three Hundred and Eighty Four and paise Seventy Six only) together with further interest and cost is duly secured by a valid and subsisting mortgage of the flat No.101, Darya Mahal, Napean Sea Road, Mumbai in favour of the plaintiff?

3. Whether the plaintiff proves that the two Bank Guarantees under agreement dated 14.7.78 was enforceable, valid and subsisting when invoked?

4. Whether the plaintiff proves that the obligation of the plaintiff under the two Bank Guarantees was not effected by any difference or dispute between the Defendant No.1 and M/s.Mohan Meakin Breweries Ltd.

5. Whether the plaintiff proves that the two Bank Guarantees did contain an unequivocal provision to pay upon invocation without demur or protest?

6. Whether the plaintiff proves that M/s.Mohan Meakin Breweries Limited filed an action to enforce a claim under the two Bank Guarantee within six months from the date of the guarantee?

7. Reliefs, if any?

7. Plaintiff laid oral evidence in the matter.

One Mr.Sohan Lal Sharma being the Constituent

Attorney of the plaintiffs has deposed by filing an affidavit of the examination in chef dt.8.9.03. He has filed additional evidence also on 7.9.04. In his deposition he has once again repeated verbatim what is stated in the plaint. In so far as documents are concerned, plaintiffs have admitted that plaintiffs have not been able to produce any documentary evidence whatsoever. He has admitted that he does not have copies of either originals of any of the documents nor he has original copies thereof so as to produce the said documents by way of secondary evidence. Plaintiffs have only relied upon the documents which are produced by defendants in the course of their evidence. In so far as plaintiffs are concerned only evidence laid is in the form of oral evidence without being supported by any documents whatsoever.

8. Plaintiffs have onceagain repeated very same story that plaintiffs are not liable to make payment because defendant no.2 has committed breach of the terms and conditions of the agreement dt.14.7.78. It has been reiterated that it is only on 26.12.78 that defendant no.2 gave letter of

authority to the plaintiffs and leaving only one day i.e.26.12.78 for carrying on obligation of the agreement dt.14.7.78 which according to the plaintiff was impossible. It is also deposed that 28.12.78 and 29.12.78 were bank strike. 30.12.78 was annual account closing day and 31.12.78 was Sunday. Thus, it was not at all possible for plaintiffs to carry out any banking facility for opening Letter of Credit and importing goods and therefore, plaintiffs were not liable at all nor was he liable to make payment of bank guarantee. In the aforesaid circumstances, witness of plaintiffs has been cross-examined by defendant no.2. In his cross-examination, he has admitted that effectively he did not take any steps pursuant to agreement d.14.7.78 and he was aware that items which are mentioned in the agreement were required to be imported on or before 31.12.78. There was also further cross-examination on the liability to make payment of bank guarantee amount. However, what is significant is following deposition of the plaintiff’s witness in cross-examination. It is true that plaintiff firm were not in position to import the goods by 31.12.78. Further deposition

was also given in cross-examination as under:

> "No orders were placed for hops with any firm. No orders were placed with any firm for filter sheets. No order was placed for supply of crest lease. No order was placed with any firm for supply of refractories. No order was placed with any firm for supply of wooden casks."

9. As against that defendant no.2 have laid oral evidence of one Mr.Surinder Kumar Kochar who is the Manager Legal of defendant no.2. He has filed documentary evidence from Ex.D-1 to D-61 in the form of compilation. Defendant no.2 in his oral evidence has once again deposed that the plaintiffs have breached by non-compliance of the agreement dt.14.7.78 and therefore, his evidence should be accepted. The said defendant no.2 was cross-examined by plaintiff and the entire cross-examination is actually without any material and baseless and pertain to only banned imposed by Government on the import of refractories.

10. In Suit No.1225 of 1981 where bank is plaintiff, bank has laid deposition of one Mr.Bernand Pinto, Branch Manager and Constituted

Attorney. He has also produced documents which are Ex.P1 to Ex.P30 to the said evidence. He has admitted that he was not an officer when the said transaction took place and is deposing only on the basis of records. He has also produced his documents before the court. Officer was cross-examined by the plaintiff bank. In his cross-examination he has deposed that action to enforce the claim in bank guarantee does not mean filing of a suit. He has also deposed in his cross-examination that he has rightfully paid the amount to the defendant no.2 under the said guarantees.

11. In the documents which are produced by the plaintiff bank plaintiffs have produced original power of attorney. They have also produced agreement dt.14.7.78. They have produced two bank guarantees in his favour. They have also produced two original counter indemnities both dt.8.12.78. They have also produced original agreement of guarantee dt.8.12.78 They have also produced original documents of flat no.101 situated at Darya Mahal "A", 80, Napean Sea Road, Bombay 400 006

being original sale agreement dt.12.6.69 and the correspondence in original. Correspondence which was exchange prior to the institution of suit demanding balance payment of Rs.80,000/- by the plaintiff bank from defendant no.1 are also produced in the form of documentary evidence before this court. This is the scenario as far as evidence is concerned between the parties.

12. The learned counsel for the parties as well as learned counsel for defendant no.1 and 2 has advanced the arguments before me. Though various issues are framed, only two points are required to be considered and decided so as to answer all the issues which are framed by the court. Firstly, whether under the agreement dt.14.7.78 plaintiffs have discharged its obligation towards defendant no.2 and discharged defendant no.2 who has committed breach of the terms and conditions of the agreement dt.14.7.78 so as to discharge the plaintiff from its liability to import the goods on behalf of defendant no.2 and thus, bank guarantee cannot be invoked. Secondly, that whether invocation of bank guarantee and payment by bank to

the defendant no.2 is legal and valid particularly in the light of clause viii of the said bank guarantee.

13. Both the parties have agreed before me that answer to these two issues would answer all the issues which are issued before the court. The learned counsel for the plaintiffs has therefore concentrated on these two issues. The learned counsel for the plaintiffs has contended that under the agreement dt.14.7.89 following terms and conditions were required to be fulfilled by defendant no.2 and the discharge of the said terms and conditions has resulted in breach of agreement dt.14.7.78. He has contended that under the terms and conditions of the agreement, defendant no.2 was bound and liable to make payment of entire amount of Rs.2,48,535/- and only thereafter, plaintiffs were required to issue bank guarantee in favour of defendant no.2. It is his case that immediately on execution of agreement dt.14.7.78 defendant no.1 was liable to issue letter of authority so as to effectively take steps under each of the five replenishment licences for the purpose of effecting

import of the various goods as agreed by defendant no.2. It is the case of the plaintiffs that correspondence indicates that defendant no.2 has not discharged its obligations under various terms of the said agreement dt.14.7.78 and therefore the plaintiff is discharged from its liability thereunder. It is the case of defendant no.2 that the letter of authority only in respect of one licence was issued on 26.12.78 when in fact terms of the contract provides 31.12.78 as a date of completing the agreement. Alternatively, it has been contended by the learned counsel for the plaintiffs that by mutual understanding date of 31.12.78 was extended upto 30.6.79 and 31.12.78 was not a date by which entire contract ought to have been performed. It is his case that time was not an essence of the contract between the parties under the said terms and conditions of the agreement. It is thus, contended that agreement is dt.14.7.78 has not been performed because the default on the part of the defendant no.2. The learned counsel for the plaintiffs has alternatively contended that assuming that there is breach on the part of plaintiffs on the terms and

conditions of the agreement dt.14.7.78 still defendant no.1 was in error in honouring the bank guarantee because bank guarantee was not validly invoked. It is his case that for the purpose of invocation of bank guarantee defendant no.2 was required to file a suit and mere letter would not suffice to invoke the said bank guarantee. He has contended that under clause VIII of the bank guarantee it has been provided as under:

> "(viii) Notwithstanding anything herein before contained our liability under this guarantee is restricted to Rs.2,00,000/- (Rupees Two Lacs only). Our guarantee shall remain in force until 31st March 1979 unless an action to enforce a claim under the guarantee is filed against us within six months from the date, all rights under the said guarantee shall be forfeited and we shall be relieved and discharged from all liability hereunder. Our Guarantee No.21/78 dated 8.12.78 for Rs.2,00,000/- (Rupees Two Lacs Only), valid upto 31st March 1979.

14. It has been thus, contended that under clause VIII it is necessary that bank guarantee can be invoked only by initiating an action. Accordingly, the learned counsel initiated action by means of filing a suit and not merely raising a

demand and thus defendant no.1 has wrongfully paid amount to defendant no.2 on merely raising of demand without filing any suit as required under clause VIII thereof. The learned counsel for the plaintiffs in support of the aforesaid contention has relied upon the Judgment of Apex Court in the case of State of Maharashtra Vs.Dr.M.N.Kaul (Dead) by his legal representatives and another reported in AIR 1967 Supreme Court 1634, Judgement of the Calcutta High Court in the case of Tripura Jute Mils Ltd. Vs. Standard Chartered Bank reported in 1988 (2) Bank CLR 578 and the Judgement of the Apex Court in the case of Janki Vashdeo Bhojwani and Another Vs. IndusInd Bank Ltd. and Ors reported in (2005) 2 Supreme Court Cases 217.

15. On the other hand, the learned counsel for defendant no.2 has contended that evidence produced indicates plaintiffs are totally in breach of agreement dt.14.7.78. It has been contended by learned counsel for defendant no.2 that under agreement dt.14.7.78 what was required is not merely import of the goods but what is required is to commence right from the stage of bringing

quotation, placing orders with third parties and thereafter opening of Letter of Credit and thereafter importing the goods and clearing the goods for home consumption. It has been the case of the defendant no.2 that none of the acts which are required to be carried out even commenced. It is the case of defendant no.2 that save and except getting one quotation in respect of one of the 5 items of goods which were required to be imported, plaintiffs has failed to take any action to perform and comply with the obligation under the agreement dt.14.7.78. It is the case of defendant no.2 that not only that no quotations were invited, no orders were placed and therefore boggy of plaintiffs that letter of authority should be given only on 26.12.78 making it impossible for the contract to perform is after thought and without any substance. It is further case of defendant no.2 that defendant no.2 was not obliged to issue letter of authority till and until it is satisfied that plaintiffs have taken necessary steps which are required precedent to opening of Letter of Credit. It is further case of defendant no.2 that inspite of opening Letter of Credit and issuing reminders plaintiffs should take

steps to import the goods particularly by inviting quotations as well as placing orders still the plaintiffs did not take any action. It has been further pointed out that by letter dt.26.7.78 defendant no.2 gave a list of parties for whom the quotation should have been invited from the parties but except in one case no other quotations were invited nor plaintiffs have produced any evidence to show that they have taken any steps to comply with the agreement dt.14.7.78 and according to defendant no.2 thus the plaintiffs has admittedly committed breach of the terms and conditions of the contract and bank guarantee was rightly invoked.

16. The learned counsel for defendant no.2 has further contended that once it is established that bank guarantee has been rightly invoked plaintiffs are not entitled to any decree and the contention that bank guarantee has been wrongfully invoked does not require to be even looked into. However, he has further contended that even assuming that second point also requires to be considered, he has pointed out hat said bank guarantee being unconditional and on demand what is required to

invoke the said bank guarantee is only a demand to make payment and it is not necessary to file a suit for invocation of bank guarantee as contended by the plaintiff.

17. The learned counsel for defendant no.1 has contended that defendant no.1 was obliged to make payment under the bank guarantee and defendant no.1 was not concerned with whether plaintiffs is in breach of the terms and conditions of the agreement dt.14.7.78 or not. It has been contended by learned counsel for defendant no.1 that defendant no.1 is not a party to the agreement dt.14.7.78 and the contract of guarantee between the plaintiff and defendant no.1 is an independent contract and the same cannot be dependent upon the agreement t dt.14.7.78 or its performance. It has been contended by learned counsel for defendant no.1 that bank guarantee being on demand is rightly invoked by defendant no.2 and defendant no.1 has rightly honoured the said bank guarantee because defendant no.1 as a bank was liable to be stand by its obligation under the said bank guarantee. It has been further contended that in view of the fact

that inspite of payment, plaintiffs failed to make payment of balance amount towards the said bank guarantee and thus defendant no.1 was required to make payment after encashment of fixed deposit by putting its own fund and this money of Rs.80000 defendant.1 is entitled to recover from the plaintiffs alongwith interest. Further, it has been further contended by learned counsel for defendant no.1 that there is a valid equitable mortgage in favour of plaintiff bank of the said flat and necessary evidence of equitable mortgage has already been laid by producing oral documents and therefore defendant no.1 is entitled to decree of suit and enforcement of mortgage for the recovery of decreetal amount as ascertained by the court by sale of the said flat if the amount is not paid by plaintiffs within the stipulated period of time by this court. It has been thus, contended that suit filed by plaintiffs advocate should be decreed whereas suit field by defendant no.1 being suit no.1013 of 1981 should be dismissed.

18. At this stage both the parties i.e. plaintiff in suit no.1031 of 1981 and plaintiff in

suit 1225 of 1981 states that by consent following order may be passed:

19. There shall be decree in favour of the plaintiff bank in suit no.1225 of 1981 for sum of Rs.1,50,000. The said amount of Rs.1,50,000 to be paid by the defendants in suit no.1225 within the period of 3 months in equal monthly instalments commencing from 1.2.06 and ending with 30.4.05. The aforesaid instalments to be paid on 10th of each month. In an event of default in any one of the instalments there shall be decree as prayed in suit no.1225 of 1981 in favour of the plaintiff bank and against the defendants therein and the plaintiff bank will be entitled to execute decree against the suit flat which has been validly mortgaged in favour of plaintiff bank being flat bearing no.101, Building no.3, Darya Mahal (A), Sagar Co-op.Housing Society Ltd, 18, Napean Sea Road, Bombay 400 006 by way of deposit of title deeds.

20. It is further agreed by and between the parties that till the time entire decreetal amount

in instalment is not paid by the defendants, defendants will not alienate, encumber or create third party rights in respect of said suit flat being flat bearing no.101, Building no.3, Darya Mahal (A), Sagar Co-op.Housing Society Ltd, 18, Napean Sea Road, Bombay 400 006. However, on payment of the entire decreetal amount the plaintiff bank will return to the defendants original title deeds in respect of the said mortgage flat.

21. In an event if there is a default plaintiff bank will execute decree forthwith without any further reference to the court. In an event of default in payment of decretal amount Court Receiver, High Court will stand appointed as Receiver in respect of suit flat in execution of decree with all powers to sell the said flat and recover the decretal amount.

22. In so far as suit no.1013 of 1981 is concerned, the learned counsel for plaintiff seeks leave to withdraw the suit. Suit is dismissed as withdrawn. Plaintiff will be entitled to refund as

per the rules. No order as to costs.